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In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit held that limitations on second or successive habeas corpus petitions found in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) apply to all habeas proceedings (even "original" Supreme Court petitions), and that enforcing those limitations to preclude consideration of a claim of incompetency for execution would violate the Suspension Clause of the Constitution. To avoid such a constitutional problem, the Ninth Circuit construed competency for execution claims as being so unique that they are not subject to the AEDPA's limitations. Each of these conclusions contradicts a direct or implicit holding of *In re Medina*, 109 F.3d 1556 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997), as well as being subsequently rejected by *In re Davis*, 121 F.3d 952 (5th Cir.), *app. for stay and habeas corpus denied*, No. 97-5798 (1997). This circuit split raises the following questions:

1. Did Congress intend the AEDPA's limitations on second or successive habeas corpus petitions to apply to all claims and in every court, including competency for execution claims and applications for "original" Supreme Court habeas corpus writs?

2. Would applying the AEDPA to prevent consideration of a claim of incompetency for execution, which is raised in a second or successive habeas corpus petition, constitute a violation of the Suspension Clause?

3. By what means can this Court review these issues?

PARTIES TO THE PROCEEDINGS BELOW

This case stems from a habeas corpus proceeding in which Petitioners here, Terry L. Stewart (Director of the Arizona Department of Corrections) and Grant Woods (Attorney General of the State of Arizona) were the respondents. That proceeding was initiated by Ramon Martinez-Villareal, a prisoner in the custody of Petitioner Stewart under sentence of death. Relief is sought against an order issued by a panel of judges of the Ninth Circuit Court of Appeals comprised of Judges Edward Leavy, Dorothy W. Nelson, and Thomas G. Nelson.

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OPINION BELOW

The opinion staying Respondent's execution and ordering briefing of the relationship between the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Suspension Clause of the United States Constitution is published as *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). (J.A. at 170.) The opinion embodying the court of appeals' construction of the AEDPA to avoid the perceived Suspension Clause issue is published as *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). (J.A. at 179.)

STATEMENT OF JURISDICTION

Petitioners requested issuance of either a statutory writ of certiorari or an extraordinary writ (mandamus, prohibition, or common law writ of certiorari), to enable this Court to review the decision in *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). The Ninth Circuit issued its decision on June 23, 1997. Petitioners filed their petition on August 18, 1997, within the 90-day limit for a statutory writ of certiorari. Petitioners contend that this Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. §§ 1254(1) and 1651(a); and Supreme Court Rules 10 and 20.1. This Court granted a "writ of certiorari" on October 14, 1997, without specifying the form of certiorari contemplated. Details concerning jurisdiction are addressed in Argument III.

PROVISIONS INVOLVED

The Suspension Clause, Article I, Section 9, Clause 2, of the Constitution:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

28 U.S.C. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil

> or criminal case, before or after rendition of judgment or decree . . .

28 U.S.C. § 1651(a):

> The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2244 (as amended in 1996): See Appendix A reflecting changes effected by P.L. 104-132, Antiterrorism and Effective Death Penalty Act of 1996. A.R.S. §§ 13-4021 to -24. (*See* Appendix B, to Certiorari Petition.)

STATEMENT OF THE CASE

A. General Procedural History.

Ramon Martinez-Villareal (Respondent) was convicted of two murders and sentenced to death, based on two aggravating factors (depravity – he boasted to a traveling companion that he had killed the helpless victims merely to show how "manly" he was – and commission for pecuniary gain) that were not offset by any mitigation. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Beginning in 1986, Martinez-Villareal, represented by various attorneys, litigated several federal habeas corpus petitions and two state post-conviction ("Rule 32") petitions, obtaining stays of execution but no substantive relief in any of them. *Martinez-Villareal v. Arizona*, 493 U.S. 874 (1989) (denying certiorari in second Rule 32 proceeding). In 1990, the district court issued a stay of execution and appointed yet another attorney (Sean Bruner) to represent Martinez-Villareal. In 1991, Bruner suggested, for the first time, that Martinez-Villareal might be mentally incompetent to be executed, so the district court ordered the pending habeas petition dismissed without prejudice, allowing the matter to be litigated in the state courts.

The competency for execution claim, together with 30 other claims, was raised in a third state post-conviction relief

petition, but the trial court summarily denied relief, ruling that all but three of the claims were precluded, and that those three raised nothing on which relief could be granted. The competency for execution claim was denied because it should not have been brought in a Rule 32 proceeding at all, but under a separate statute specifically dealing with such claims, A.R.S. §§ 13-4021 to -24. (*See* Appendix B to certiorari petition.) The Arizona Supreme Court denied review and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 506 U.S. 893 (1992).

Bruner then filed an amended habeas corpus petition, arguing many of the claims presented in the Rule 32 proceeding. The district court rejected most of them, but ordered that Martinez-Villareal be resentenced, on the theory that he had received ineffective representation during the original sentencing. The district court left unresolved the issue of Martinez-Villareal's competency to be executed, holding that the claim was not "ripe" for decision – there was then no warrant for his execution and the claim had not been exhausted in the state courts, because no proceeding had ever been brought under the state's competency statute. On appeal, the Ninth Circuit vacated the resentencing order so that Martinez-Villareal was not granted relief of any kind. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). Left unresolved was the competency issue, which the court found had been brought to the federal courts "premature[ly]"; it specified that its order "to enter judgment denying the petition [was] not intended to affect any later litigation of that question." 80 F.3d at 1307 and 1309 n.1.

In early 1997, the defense finally filed a motion under the statute dealing with competency for execution, requesting a hearing. The Arizona Supreme Court issued an execution warrant for April 16, 1997, but reset the execution to May 21, 1997, to allow Martinez-Villareal more time to prepare for the hearing. (J.A. at 27.) Having heard four days of testimony, the trial judge concluded that, "Defendant is aware that he is to be punished for the crime of murder and [ ] he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villareal is therefore competent

to be executed under the laws of the State of Arizona." (J.A. at 48.) On May 16, 1997, the Arizona Supreme Court unanimously agreed that Martinez-Villareal is competent for execution and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 117 S. Ct. 1840 (1997).

B. Development of the Successive Petition/Suspension Clause Issue.

On May 14, 1997, the Federal Public Defender's Office filed a motion requesting that the district court appoint experts to examine and test Martinez-Villareal, in anticipation of filing a "supplemented" habeas petition presenting the competency for execution issue. (J.A. at 30.) Petitioners argued that Martinez-Villareal was in effect initiating a successive petition, but that the permission from the court of appeals required by 28 U.S.C. § 2244(b)(3)(A), as amended by the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), had not been obtained, so that the district court lacked authority to grant the relief requested. (J.A. at 65.) On May 16, 1997, the district court agreed with Petitioners and denied Martinez-Villareal's request (J.A. at 101), and he appealed. Although it denied all other relief, the Ninth Circuit ordered that the execution be stayed and that further briefing be submitted concerning whether the AEDPA's limitations on successive petitions, as applied to competency for execution claims, amounted to an unconstitutional suspension of the writ of habeas corpus. *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). (J.A. at 170.)

Following oral argument, the Ninth Circuit issued the opinion which is the subject of this case. *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). (J.A. at 179.) Citing *Herrera v. Collins*, 506 U.S. 390, 406 (1993), the majority opinion stated that claims of incompetency for execution, which were first recognized as possessing a constitutional basis in *Ford v. Wainwright*, 477 U.S. 399 (1986), were to be "properly considered in proximity to the execution." 118 F.3d at 630. Hence, when Martinez-Villareal first raised his competency claim in federal court, no execution warrant was

operative, so the claim had not been addressed because of its prematurity. *Id.* However, the majority believed that, even if there had been an execution warrant pending at the time that Martinez-Villareal first raised the competency claim in federal court, it would still have been premature, because of the statement in *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1297 (1996), that, "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Thus, because a stay would necessarily have issued to permit federal court consideration of the rest of Martinez-Villareal's claims, and that stay would automatically have rendered the execution non-imminent, the competency claim would still have been premature and not open to consideration in the first habeas proceeding. *Id.*

The situation is further complicated by the passage of the AEDPA. The majority below recognized that 28 U.S.C. § 2244, as amended, divides successive habeas petitions into just two categories: those raising claims that were presented in a previous petition, and those raising claims that were not presented in a previous petition. Those in the first category are required, without exception, to be dismissed, while those in the second category will also be dismissed, unless they can pass through the narrow "gateway" exceptions permitted by § 2244(b)(2). *Id.* at 630-31. The first exception, subsection 2244(b)(2)(A), for claims relying on a new rule of constitutional law that was unavailable at the time of the applicant's first habeas petition, does not apply to Martinez-Villareal's competency for execution claim, because such claims have been available since *Ford v. Wainwright* was decided in 1986. *Id.* at 631. The second exception, subsection 2244(b)(2)(B)(i) and (ii), involving newly discovered facts, also is unavailable in a situation like this one, because of the requirement that the new evidence be such as would establish that no reasonable factfinder "would have found the applicant guilty of the underlying offense." This limitation excludes all claims – including competency for execution – that raise only sentencing matters. *Id.; see also Greenawalt v. Stewart*, 105 F.3d

1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997); *In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997); *In re Davis*, 121 F.3d 952, 955 (5th Cir. 1997) (concession by petitioner under death sentence that claim of incompetency for execution not cognizable under this exception). "It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed." *Martinez-Villareal v. Stewart*, 118 F.3d at 631.

The court of appeals believed that this situation created a "predicament" of constitutional proportions, in that the preclusion of habeas corpus review might amount to a violation of the Suspension Clause, United States Constitution, Article I, Section 9, Clause 2. *Id.* The majority opinion rejected the possibility of certiorari review by this Court as an adequate solution to the perceived problem because that is part of the direct review process, rather than a mode of plenary collateral review. *Id.* at 631 and n.3. It also found no solution in this Court's authority to issue "original" writs of habeas corpus because, contrary to the Eleventh Circuit's conclusion in *Medina*, 109 F.3d at 1564, it concluded that § 2244(b)'s restrictions on successive petitions apply to petitions initiated in this Court, as well as in the lower courts. *Id.* at 631-32. To avoid the hypothesized "difficult constitutional question," the majority below effectively rewrote the AEDPA, determining that, henceforth, competency for execution claims will constitute a new category of successive claims, which will be *required* to be brought in multiple habeas petitions, but which, nonetheless, will not be precluded as successive, on the theory that bringing them initially when they are "premature" is the same as not having brought any cognizable prior petition at all. *Id.* at 632-34. Utilizing this transmogrified view of a "successive" petition, the majority deemed the requirement that a court of appeals grant or deny permission for the filing of a successive petition to be completely inapplicable to competency for execution claims, so it simply transferred Martinez-Villareal's second habeas petition to the district court for further proceedings. *Id.* at 634-35. The third

member of the court below believed that the Suspension Clause issue could not be avoided in this manner, and that the AEDPA's restrictions on habeas review as applied to competency for execution claims violate the Suspension Clause. However, he concurred in the result, considering the transfer of the competency claim to the district court a satisfactory resolution. *Id.* at 635.

SUMMARY OF ARGUMENT

The court of appeals' analysis of the case depends in part upon the Act's restrictions on successive petitions applying to "original" petitions for habeas corpus filed in this Court; if the restrictions do not apply, then Respondent obviously still has that habeas remedy available to him, and there can be no Suspension Clause problem. Although the matter was discussed in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 2337-39 (1996), the Court's statement, "Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions," left some doubt about the matter. Petitioners contend that the AEDPA's restrictions on successive petitions *do* apply to petitions filed in this Court. This Court has recognized throughout its history that the authority of all the federal courts to issue habeas writs, itself included, is granted by statute. *Id.* at 2338 and n.1, and 2340 (tracing current 28 U.S.C. § 2241 back to the Judiciary Act of 1789 and citing *Ex parte Bollman*, 4 Cranch 75, 94 (1807)). Since the source of this Court's authority is identical to the source of authority for the lower federal courts, it necessarily follows that this Court is likewise "bound" by the restrictions on that authority enacted by the AEDPA. Hence, the Suspension Clause issue cannot be avoided through use of "original" petitions to this Court.

The real question, therefore, is what the Suspension Clause (which contains no internal definitions) actually protects. The language of the Clause, the manner of its passage, and the precedents of this Court (beginning with *Bollman*) make clear that the Clause was not intended to create a substantive new right, but only to protect from Congressional

suspension a right that already existed, which was defined by the English common law (particularly as regularized by the English Habeas Corpus Act of 1679). Those English sources, thoroughly familiar to the Framers, and largely incorporated into the writ-authorizing Section 14 of the Judiciary Act of 1789, were designed to protect against arbitrary imprisonment without trial, *not* to provide quasi appellate review of criminal cases after conviction. Moreover, the Judiciary Act of 1789 (passed by the First Congress, which contained many of the members of the Constitutional Convention), by its very terms, excluded from the privilege persons under *state* custody. Thus, the Framers plainly intended the Suspension Clause only to protect the privilege as it existed at common law, so that no constitutional protection was afforded to persons already under conviction, and particularly not state prisoners.

Although the federal habeas writ has subsequently been extended to apply to persons after conviction, including state inmates, those extensions all rest on Congressional enactments, particularly the Judiciary Act of 1867. This Court has never held that a Congressional restriction on the use of habeas transgressed the Suspension Clause. It follows that what Congress has bestowed, Congress is constitutionally permitted to regulate and restrict. Where Congress determines to withdraw habeas jurisdiction, applicants have no constitutional basis for complaint, regardless of what their subjective expectations of relief may have been. *See, e.g., Ex parte McCardle*, 7 Wall. 506 (1868) (acknowledging loss of jurisdiction over habeas appeal, even after it had been argued and submitted for decision, because of revocation of authorizing statute). Therefore, that Martinez-Villareal anticipated being able to litigate his competency claim by returning to the district court when that claim had become ripe, but his expectation will be thwarted by the intervening enactment of the restrictions on successive petitions, does not demonstrate that the Suspension Clause will be violated. And since there is no constitutional violation to avoid, the court of appeals' disembowelment by "construction" of the AEDPA is error not to be tolerated.

The appropriate jurisdictional basis for the Court to hear this matter is complicated by an AEDPA provision, 28 U.S.C. § 2244(b)(3)(E), which states that courts of appeals' grants or denials of authorization to file successive habeas petitions shall not be the subject of petitions for rehearing or certiorari. However, since in this case the Ninth Circuit purported *not* to be granting or denying permission to file a successive petition, but rather, were construing the Act so as to exclude Martinez-Villareal's petition from even being considered "successive," Petitioners should be deemed entitled to come before the Court by means of ordinary, statutory certiorari. However, if the statutory preclusion on review by certiorari is deemed applicable here, it is certain that this case presents appropriate grounds for consideration pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g., De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945). Hence, though it remains for the Court to determine which basis is most appropriate, it is certain that the case is properly before it.

The Court should therefore hold: that this case is properly before it; that the AEDPA restrictions on successive habeas corpus petitions apply to original petitions filed in this Court; and that those restrictions do not violate the Suspension Clause, thus the court of appeals' opinion "construing" the Act was erroneous. This Court should then vacate the order transferring Martinez-Villareal's petition to the district court for further action, and deny his request for permission to file a successive petition.

ARGUMENT

I

THE AEDPA'S RESTRICTIONS ON SUCCESSIVE HABEAS CORPUS PETITIONS APPLY TO ALL KINDS OF CLAIMS AND TO ALL COURTS.

The Ninth Circuit concluded that, if 28 U.S.C. § 2244(b)'s restrictions on second or successive habeas petitions (hereafter referred to as "successive petitions") apply to

Martinez-Villareal's claim of incompetency for execution, it would constitute a violation of the Suspension Clause, so it "construed" the AEDPA to avoid the perceived constitutional problem. 118 F.3d at 631-34. This reconstruction of the statute can be justified only if the AEDPA's restrictions apply to competency for execution claims, and to "original" habeas corpus petitions brought in this Court; otherwise, Martinez-Villareal suffers from no "predicament" which needs to be resolved, and the judicial redrafting of the statute is patently erroneous. The Ninth Circuit recognized that its view that the restrictions on successive habeas corpus petitions apply to "original" habeas petitions in this Court directly contradicts the conclusion of the Eleventh Circuit in *In re Medina*, 109 F.3d at 1564. *Id.* at 631-32 and n.4; *see also In re Davis*, 121 F.3d 952, 956 (5th Cir.), *app. for stay and pet. for habeas corpus denied*, No. 97-5798 (1997).

A. Changes Effected By the Amendments Concerning Successive Petitions.

What Congress did with regard to successive habeas petitions can most clearly be understood by examining the version of 28 U.S.C. §§ 2244 and 2255 provided in Appendix A, which shows by strikeouts and italics the language removed and added by the AEDPA. Subsection (a) of § 2244 continues to voice the principle that federal judges should not entertain repetitive petitions from federal prisoners, but it is significantly tightened in that refusal of a successive petition is now required, even if previously unpresented or undetermined grounds are being raised, unless the narrow exceptions included in § 2255 (as amended) are satisfied. Moreover, the discretion previously possessed to evaluate whether the "ends of justice" would be served by consideration of a successive petition has been removed.

Former subsection (b) of § 2244 has been completely expunged. Before the amendment, the statute provided that a successive petition "need not" be entertained, which permitted some discretion in determining whether to consider such petitions. That discretion is no longer available. Previously

the subsection also indicated that successive petitions should be accepted, if they were based on "factual or other" grounds not adjudicated in the first proceeding, so long as the judge was satisfied that there had not been deliberate withholding of the newly asserted ground or other (undefined) abuse of the writ. This language, which had been reiterated as Rule 9(b) of the Habeas Corpus Rules, also is gone.

Substituted is a completely new subsection (b), which divides the universe of successive petitions into just two categories. Under (b)(1), any claim that *was* presented in a prior petition "shall be dismissed" – regardless of how it was dealt with in the prior proceeding. Under (b)(2), any claim that *was not* presented in the prior petition shall also be dismissed, unless: (A) it relies on a new rule of constitutional law made retroactively applicable by the Supreme Court, or (B) it relies on new facts which could not have been discovered previously *and* is such that the habeas applicant would not have been found guilty. Conspicuously absent is allowance for relief in a successive petition on any ground which is related to the sentence imposed rather than actual innocence. Moreover, the district courts are forbidden by new subsection (b)(3) even to consider successive petitions unless permission has been granted by the court of appeals. In short, § 2244 as amended is not even a ghost of its former self, but rather, is a completely new creature.

The amended version of § 2244(b) specifically requires that the petition that Martinez-Villareal now wishes to litigate be treated as a successive petition. The statute permits no inquiry into the applicant's subjective state of mind ("deliberately withheld"), while the whole amorphous concept of "other abuse of the writ" has been replaced by clear and simple categorization of types of successive claims (previously presented or not previously presented), all of which are precluded, absent demonstration of one of the two narrow, objectively ascertainable exceptions. The "ends of justice" language in § 2244(a), which this Court continued to use as a basis for decisions concerning successive petitions by *state* prisoners even after Congress deleted it from § 2244(b) in the 1966 revision of the habeas statutes, *Kuhlman v. Wilson*, 477

U.S. 436, 448-52 (1986), has been completely removed; thus, "the permissive language of § 2244(b) giv[ing] federal courts discretion to entertain successive petitions under some circumstances" (477 U.S. at 451) no longer exists.

In short, after watching the courts struggle for three decades with the vague contours of "ends of justice" and "abuse of the writ," Congress cut completely through the jurisprudential Gordian knot, abolishing those nebulous concepts and replacing them with the sharply-defined categories and exceptions discussed above, in a manner which brooks no reasonable question about its intent to make the first habeas petition the "one bite at the apple" available, and to make acceptable successive petitions extremely rare. Since Martinez-Villareal undeniably has already had one fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.

B. The AEDPA's Restrictions on Successive Petitions Apply to Competency for Execution Claims.

There seems to be no dispute that the restrictions on successive petitions in 28 U.S.C. § 2244(b) apply to competency for execution claims. Nothing in the language of the statute or its legislative history indicates Congressional intent to exempt any particular category of claims from the universal language restricting successive petitions, and the three courts that have considered the matter all agree that these restrictions apply to competency for execution claims. *Medina*, 109 F.3d at 1564-65; *Davis*, 121 F.3d at 954; *Martinez-Villareal*, 118 F.3d at 630-31.

C. The AEDPA's Restrictions on Successive Petitions Apply to "Original" Habeas Corpus Petitions In This Court.

As previously noted, the circuits diverge regarding the *results* of applying the restrictions to competency for execution claims. The Eleventh and Fifth Circuits saw no problem in precluding district court habeas consideration, because of their view that an inmate can obtain adequate federal review

by means of a certiorari petition or an unrestricted original habeas corpus petition to this Court. *Medina*, 109 F.3d at 1564; *Davis*, 121 F.3d at 956. The Ninth Circuit, by contrast, sees the AEDPA's restrictions on successive habeas petitions as applying even to original petitions to this Court, and certiorari from the state court proceeding as inadequate, because it is not a form of plenary collateral review. *Martinez-Villareal*, 118 F.3d at 631-32 and nn.3, 4. This perceived lack of adequate federal court collateral review motivated it to reconstruct the statute, to avoid the supposed Suspension Clause issue. *Id.* at 632-34. Hence, to determine whether the manipulation of the statute is warranted, this Court must first decide whether its "original" writs of habeas corpus are subject to the AEDPA's restrictions on successive petitions.

This question was touched upon, but not decided, in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996). The time has come to resolve it, and Petitioners contend that the AEDPA's restrictions *do* apply to such original petitions.[1]

This Court has agreed since the time of Chief Justice Marshall that "power to award the writ by any of the courts of the United States must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807), quoted approvingly in *Felker*, 116 S. Ct. at 2340. The statutory authority known to him, Section 14 of the Judiciary Act of 1789, "is the direct ancestor of 28 U.S.C. § 2241," the single source from which all federal courts derive their authority to issue writs of habeas corpus. *Felker*, 116 S. Ct. at 2338 and n.1. Indeed, the first issue considered in *Felker* was stated to be the extent to which the provisions of the AEDPA "apply to petitions for habeas corpus filed *as original matters in this Court pursuant to 28 U.S.C. §§ 2241 and 2254.*" *Id.* at 2337 (emphasis added). The conclusion was that the AEDPA did not repeal the Court's "authority to entertain a petition for habeas

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[1] Petitioners' position below (relying upon *Medina)* was that the restrictions do not apply to this Court. Reconsideration of the matter in light of the Ninth Circuit's analysis has persuaded Petitioners that the restrictions of the AEDPA do apply to original petitions filed with this Court.

corpus" – "As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication [by the Act of 1867], we decline to find a similar repeal of § 2241 of Title 28 – its descendant, n.1, *supra* – by implication now." *Id.* at 2339. Chief Justice Rehnquist has referred, collectively, to "the statutes governing habeas corpus, 28 U.S.C. § 2241-2255." *Lonchar v. Thomas*, ___ U.S. ___ , 116 S. Ct. 1293, 1304 (1996) (concurring opinion). Similarly, *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2063 (1997), refers to the AEDPA as "amend[ing] § 2244 and §§ 2253-55 of chapter 153 . . . governing *all habeas corpus proceedings in the federal courts*." (Emphasis added.) Many of the individual sections within Chapter 153 specifically refer to both this Court (or its individual justices) and the lower federal courts, without drawing any distinction between them, except as required by their relative positions. See 28 U.S.C. §§ 2241(a) and (b), 2242, 2243, 2251, and 2254(a). Conspicuously absent is any differentiation between the standards and procedures to be employed by this Court and the lower federal courts. Indeed, Supreme Court Rule 20.4 expressly incorporates the requirements of §§ 2241, 2242, and 2254, all of which (apart from limited express exceptions) govern habeas petitions in the lower courts. Thus, since the source of authority for this Court to issue original writs is identical to the source of the grant to the lower courts, it necessarily follows that this Court is subject to the same restrictions imposed on those courts, absent a clear Congressional intent to the contrary.

No such intent to exempt petitions filed in this Court is found in the AEDPA. On the contrary, the language of the amendments demonstrates that they were intended to apply to *all* habeas proceedings, including those originating in this Court. As noted in *Felker*, the "gatekeeping" provision codified as § 2244(b)(3) obviously cannot apply to this Court, because it is specifically directed at applications "filed in the district court." 116 S. Ct. at 2339. "If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then §§ 2241(b)(1) and (2) should apply to the Supreme Court because they are not

similarly limited." *Martinez-Villareal*, 118 F.3d at 632. This is essentially the mode of analysis applied by the Court to other portions of this same legislation in *Lindh v. Murphy*: the explicit provision for retroactive application of Chapter 154 implicitly indicated that Chapter 153 was *not* intended by Congress to apply to pending cases. 117 S. Ct. at 2063. By parity of reasoning, the express limitation on the applicability of § 2244(b)(3) to district court proceedings implies that § 2244(b)(1) and (2) are not to be so limited, and therefore apply to habeas proceedings initiated in this Court.

Felker is not to the contrary, despite the misunderstanding of this point evinced by the Eleventh Circuit in *Medina* (109 F.3d at 1564) and followed by the Fifth Circuit in *Davis* (121 F.3d at 956). The *Felker* opinion carefully distinguished between the issues of whether the AEDPA "deprived" this Court of jurisdiction even to "entertain" original habeas petitions, and whether the AEDPA imposed conditions or limitations on the ability to grant relief on original petitions when they were being "entertained." 116 S. Ct. 2337. The point of *Felker*'s discussion of *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), was that the repeal of this Court's jurisdiction to entertain original habeas petitions cannot be done *by implication*. While Congress can constitutionally revoke parts of this Court's appellate jurisdiction (as was permissibly done in the 1868 withdrawal of this Court's authority to hear appeals from the circuit courts, and in the AEDPA's withdrawal of certiorari jurisdiction concerning circuit court judgments on applications to file successive petitions), it must be explicit, and the AEDPA contains no such clear revocation of this Court's jurisdiction to receive "original" habeas petitions. Thus, such jurisdiction to entertain original habeas petitions still exists. 116 S. Ct. at 2338-39.

However, the "requirements a state prisoner must satisfy to show he is entitled to a writ of habeas corpus from this Court" is a matter logically distinct from whether the Court possesses jurisdiction to hear him at all, and hence was dealt with in a discrete portion of the *Felker* opinion, Part II(B). *Id.* at 2339. This is where the ambiguity appears because, after discussing the restrictions contained in § 2244(b)(1) and (2),

this Court states that, "Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas corpus petitions." *Id.* This isolated statement cannot carry the weight apparently given it by the Eleventh Circuit in *Medina*, which confidently asserts that, "the provisions of § 2244(b), as amended, do not restrict that Court's original habeas authority." 109 F.3d at 1564 (citing generally to "*Felker*, 116 S. Ct. at 2338-39").

This Court's discussions preceding and following the ambiguous remark seem to indicate that the § 2244(b)(1) and (2) restrictions on successive petitions are constitutional, and that in appropriate cases this Court *will* be "bound" by them. "[A]lthough *the Act does impose new conditions on our authority to grant relief*, it does not deprive this Court of *jurisdiction* to entertain original habeas petitions." 116 S. Ct. at 2337 (emphasis added). Part II(B), which specifically deals with this issue, refers to the AEDPA affecting "*requirements* a state prisoner *must* satisfy" to obtain relief here. *Id.* at 2339 (emphasis added).

> Title I of the Act has changed the standards *governing our consideration of habeas petitions* by *imposing new requirements* for the granting of relief to state prisoners. *Our authority* to grant habeas relief to state prisoners *is limited by § 2254*, which specifies the conditions under which such relief may be granted to "a person in custody pursuant to the judgment of a State court."

Id. (emphasis added). Then, after noting that while the restriction in § 2244(b)(3) applies only to petitions filed in the district courts, there is no such limitation in § 2244(b)(1) and (2); "These restrictions *apply without any qualification to any 'second or successive habeas corpus application under section 2254.'*" *Id.* (emphasis added). Later, in discussing the Suspension Clause issue, it is noted that the Act "further restricts the availability of relief" beyond the pre-existing limitations, but that "the power to award the writ by *any* of the courts of the United States must be given by written law" (quoting *Bollman*), so that judgments about the proper scope

of the writ are for Congress to make, and the "added restrictions which the Act places on second habeas petitions" are constitutional. *Id.* at 2340 (emphasis added).

The reasonable conclusion from these statements seems to be that the Court was signalling that it is "bound" by § 2244(b)(1) and (2). The opinion for the Court states that, "Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court," so that they neither satisfied the AEDPA nor the prior "exceptional circumstances" requirement of Supreme Court Rule 20.4(a). *Id.* at 2341. Similarly, Justice Stevens' concurring opinion emphasized that the original writ was being properly denied because "petitioner's claims do not satisfy the requirements of our pre-Act jurisprudence or the requirements of the Act . . . ," and Justice Souter's concurrence says that, "even applying the traditional criteria, we would choose to deny" Felker's petition. *Id.*

Thus, the Court was unanimous that Felker's petition would have been denied even under its pre-AEDPA standards, a conclusion which obviated any need to expatiate upon the new, more restrictive standards. In any event, the statement, "Whether or not we are bound by these restrictions" (*Felker*, 116 S. Ct. at 2339), is at most language of reservation, not language of determination. *Felker* cannot be understood as holding that this Court is exempt from the AEDPA's restrictions on successive petitions. For all the reasons previously presented, the Court should now affirmatively acknowledge that it is indeed "bound" by the restrictions of § 2244(b)(1) and (2) in ruling upon "original" habeas corpus petitions submitted to it, and proceed to deal with the corollary question, the constitutionality of those restrictions under the Suspension Clause.[2]

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[2] Of course, should this Court nonetheless rule that the AEDPA's restrictions on successive petitions do *not* apply to original petitions filed with it, then the Suspension Clause issue disappears even under the Ninth Circuit's analysis, and Martinez-Villareal is ineligible for district court consideration of his claim.

II

THE SUSPENSION CLAUSE IS NOT VIOLATED BY THE AEDPA'S RESTRICTIONS ON SUCCESSIVE PETITIONS, SO THE NINTH CIRCUIT ERRED IN RECONSTRUCTING THE STATUTE TO AVOID THE NONEXISTENT VIOLATION.

The premise underlying the court of appeals' handling of this case, though expressed only obliquely, is nonetheless quite clear: it believes that every state convict *always* has a right to have at least one *federal court* conduct *plenary collateral review* of his constitutionally-based claims. Thus, having determined that the AEDPA's restrictions on successive petitions apply to original habeas proceedings in this Court, it looked for alternative modes of plenary federal collateral review, but it deemed a certiorari petition from the state competency proceeding not "an adequate alternative form of collateral relief." *Martinez-Villareal*, 118 F.3d at 631-32 and n.3.[3]

Because the perceived foreclosure of habeas was considered likely to constitute a Suspension Clause violation, and because the court below believed that it had "to ensure that a petitioner's federal claims are accorded one hearing in federal court," the majority held that a successive competency for execution claim should be treated as not successive, to avoid triggering the AEDPA's restrictions. *Id.* at 632-34 (discussing *In re Turner*, 101 F.3d 1323 (9th Cir. 1996)). The concurring judge did not believe *Turner* could be stretched to cover the very different facts of this case (in which there had been years of litigation, conclusively resolving dozens of other claims),

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[3] This led to the erroneous hyperboles that "the inapplicable gateways provided by the AEDPA foreclose *any* federal review of a death row inmate's competency to be executed," and, "If we are correct, then a state prisoner's competency claim can *never* be heard by *any* federal court." 118 F.3d at 631, 632; emphasis added. The statements are patently incorrect because such claims *can* be heard, in this Court, by certiorari. Indeed, Martinez-Villareal exercised that right, in No. 96-9068, *cert. denied*, 117 S. Ct. 1840 (1997).

but agreed that inmates' loss of "opportunity to present all their federal claims in federal court" by means of habeas because of the restrictions on successive petitions, constituted a Suspension Clause violation. *Id.* at 635. Thus, all three judges below agreed that applying the restrictions on successive petitions to competency for execution claims likely would be unconstitutional, necessitating some remedy.

Petitioners believe this reasoning is flawed: unless there really is a constitutional entitlement to federal *collateral* review of *all* federal claims arising out of state criminal proceedings, precluding consideration of Martinez-Villareal's competency claim presented in a successive petition deprives him of no legal right and requires no remedy. The only source posited by either Martinez-Villareal or the court of appeals for such an entitlement is the Suspension Clause. As shown below, the Suspension Clause is not violated by applying the AEDPA here, so Martinez-Villareal's petition should have been held precluded, not transferred to the district court.

A. *Felker* Determined That The AEDPA Restrictions Do Not Constitute A Suspension Clause Violation.

Though the Ninth Circuit obviously did not perceive it that way, it appears that the Suspension Clause issue was resolved in *Felker*. Part III of that opinion considered "whether the Act suspends the writ of habeas corpus in violation of Article I, § 9, clause 2 of the Constitution." 116 S. Ct. at 2339. The Court first briefly summarized the expansion of habeas corpus through statutory amendment and Court interpretation, the result being that, "The writ of habeas corpus known to the Framers was quite different from that which exists today." *Id.* at 2339-40. Next, it noted the new requirement for obtaining permission to file a successive petition, but found this constitutionally insignificant, because it merely transferred to the court of appeals a screening function previously performed by the district courts under Habeas Corpus Rule 9(b). *Id.* at 2340. Then, applicable to this case:

> The Act also codifies some of the pre-existing limits on successive petitions *and further restricts the availability of relief* to habeas petitioners. . . .
>
> The *new restrictions on successive petitions* constitute a *modified* res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), we said that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.*, at 489, 111 S. Ct. at 1467. The *added restrictions which the Act places on second habeas petitions* are well within the compass of this evolutionary process, and we hold that *they do not amount to a "suspension" of the writ contrary to Article I, § 9.*

Id. (emphasis added; some citations omitted).

This recognizes that the AEDPA places *additional* restrictions on successive petitions, above and beyond the pre-existing (judicial) limitations which it codifies, and holds that those *additional* restrictions do not violate the Suspension Clause. Those additional restrictions obviously include § 2244(b)(1) and (2), because they were among the Act's "new requirements for granting relief," which had just been considered in Part II(B). *Id.* at 2339. Hence, it appears that *Felker* answered the Suspension Clause question. However, should the Court feel that the issue needs examination beyond that given to it in *Felker*, further discussion is provided, demonstrating that *Felker*'s conclusion was correct.

B. There Has Been No Suspension Clause Violation Because What the Clause Protects is Not Modern Statutory Habeas Corpus.

1. *What is the relevant point in time*?

To determine whether the Suspension Clause has been violated, it is necessary to know what is protected by the

Clause. The court of appeals assumed that the Clause safeguards the writ of habeas corpus as it exists today, rather than what existed in 1789, because such an assumption was mentioned in *Felker*, 116 S. Ct. at 2340. 118 F.3d at 631 n.2. Though understandable, this was a fatal error in the court of appeals' analysis, because of the fundamentally different results which follow from employing the assumption in this case and in *Felker*. In *Felker* the assumption was made with juridical safety because it could not affect the outcome: since *Felker* held that even the expansive modern writ had not been suspended, the timing issue was irrelevant. Here, by contrast, the assumption is outcome-determinative: by assuming that the privilege of habeas corpus is driven by a one-way, expansive, historical ratchet, the court of appeals necessarily concluded that the AEDPA's mandate to restrict the availability of habeas relief constituted a "suspension." In short, utilizing the assumption as the court of appeals did is judicial question-begging.

This Court plainly did not intend its statement in *Felker* to be the resolution of the timing issue. Not only is the assumption plainly stated to be such, but its conditionality is emphasized by the added phrase, "for purposes of decision here." Moreover, rather than just citing *Swain v. Pressley*, 430 U.S. 372 (1977), which also found it unnecessary to decide whether it was the old writ or the modern, expanded, writ which is protected by the Suspension Clause, *Felker* cited Chief Justice Burger's concurring opinion in *Swain*, 430 U.S. at 385, which expressly adopted the view that, "The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted," instead of the writ as it has been statutorily expanded and interpreted by this Court. The additional citation reiterates that the timing question is, at most, still open, while simultaneously suggesting that when the question is

squarely put, it will be only the 1789 form of the writ which will be found protected by the Clause.[4]

This is consistent with other indications of acceptance of Chief Justice Burger's view. In response to a claim that the Suspension Clause was violated by a statute limiting availability of transcripts in federal collateral relief proceedings, this Court said:

> This argument presupposes, *inter alia*, that a right to a free transcript is a necessary concomitant of the writ which the Founders declared could not be suspended. This is obviously not the case. The writ of habeas corpus operated until 1944 with no provision for free transcripts for indigents. Congress, when in that year it authorized free transcripts for the first time, could certainly have limited the authorization to nonfrivolous cases where a need had been shown. If Congress could have thus limited the writ directly without "suspending" it, it follows that it may do so indirectly.

United States v. MacCollom, 426 U.S. 317, 322-23 (1976) (plurality opinion).

Agreeing with the view expressed by the *MacCollum* plurality, that the operative date for Suspension Clause analysis is 1789, is an impressive array of other authorities. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 252-56 (1973) (Powell, J., concurring); *United States v. Anselmi*, 207 F.2d 312, 314 (3d Cir.), *cert. denied*, 345 U.S. 947 (1953); *Kansola v. Civiletti*, 630 F.2d 472, 474 (6th Cir. 1980), *cert. denied*, 450 U.S. 930 (1981); *Lindh v. Murphy*, 96 F.3d 856, 867-68 (7th Cir. 1996), *rev'd on other grounds*, 117 S. Ct. 2059 (1997); *Jones v. Squier*, 195 F.2d 179, 181 (9th Cir. 1952); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1966); Rex

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[4] When an issue has only been assumed in prior cases, the Court is completely free to address the matter on its merits when it is squarely presented. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993), *citing Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335 (1952) (hereafter "Collings"); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."). This means that the parameters of the constitutionally-protected writ are quite narrow, and the arena in which Congress is free to expand or contract availability of the statutory writ is very broad – a breadth clearly capable of encompassing the changes effected by the AEDPA.

2. *What is actually protected by the Suspension Clause?*

The Suspension Clause provides that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Since no definition is provided for the critical terms, it must be assumed that the Framers were utilizing terms which already possessed a commonly recognized fund of meaning. As Chief Justice Taft explained:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Ex parte Grossman, 267 U.S. 87, 108-09 (1925). Chief Justice Marshall examined the English common law to determine the meaning of habeas corpus as used in the Suspension Clause and in Section 14 of the concurrently passed Judiciary Act of 1789, 1 Stat. 82. *Ex parte Bollman*, 4 Cranch at 94-99. "In the early decades of our new federal system, English common law defined the substantive scope of the writ." *McCleskey v. Zant*, 499 U.S. 467, 478 (1991) (citing *Ex parte Watkins*, 3 Pet. 193, 201-03, 7 L. Ed. 650 (1830)). Therefore, to understand what the "habeas corpus" is that is being protected by the Clause, it is critical to understand that common-law background.

(a) English background of the writ and its suspension. There were, in fact, a whole group of writs, all referred to as "habeas corpus," which had been carefully parsed by Blackstone. *Bollman*, 4 Cranch at 97-98. Over time, the writ *cum causa* (or *ad subjiciendum*) emerged as the chief instrument by which a person had his body and cause removed from a lower to a higher court, for the purpose of inquiry into the cause of his restraint, and it was this which was celebrated by Blackstone as the "Great Writ." Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. Chi. L. Rev. 243, 243-44 and nn. 3, 4 (1965) (hereafter "*States*"). This was the writ contemplated by both the Suspension Clause and the Judiciary Act of 1789. *Bollman*, 4 Cranch at 94-95; *Carbo v. United States*, 364 U.S. 611, 614-15 (1961).

In England the judicially developed writ had been defined and regulated by the "famous" Habeas Corpus Act of 1679, 31 Car. II, c.2. Collings at 337. Particularly significant is the fact that, "Persons 'convict or in execution' were excluded altogether from the benefits of the Act [of 1679]." *Id.* at 337 n.9. "Plainly, the benefits of this famous English act were intended primarily for individuals detained for a crime but held without a warrant of commitment, or for individuals held without bail upon a warrant charging a minor offense." *States* at 252. In summary:

> [I]n 1789 in England a person in custody for a crime had the immediate right either to be charged or released. If the crime charged was a misdemeanor there was a right to bail. Once properly

> charged with treason or a felony the only right was to a trial during the next session, which the Crown might delay. *Once convicted of a crime there was no privilege of the writ.*

Collings at 338 (emphasis added). Collings surveys the English experience with "suspension" of the writ, which, of course, only related to *pretrial* curtailments of liberty, because that was the extent of the common-law writ (*id.* at 339-40), and summarizes:

> In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process. *The end result was to deny the right to trial by jury.*

Id. at 340 (emphasis added).

b. American pre-Constitutional experience with the writ and its suspension. The common law writ was in operation in all 13 colonies by 1776, and the 1679 Habeas Corpus Act had been legislatively adopted or judicially applied in six of them. William F. Duker, A Constitutional History of Habeas Corpus 115 (1980). Numerous states adopted the 1679 Act into their own law both before and after the Constitutional Convention, following it so closely that, "Chancellor Kent logically concluded that the Act of 1679 was 'the basis for all the American statutes on the subject'." Collings at 338-39; *accord*, Frank H. Hurd, A Treatise On the Right of Personal Liberty and on the Writ of Habeas Corpus 128 (1876). "The legislation in the twelve original states that followed the English act was uniform in providing that the benefits of the act should not extend to persons properly charged with felony or treason or to 'persons convict' or in execution under civil or criminal process." *States* at 254. "By both common and statute law, the general rule was that the writ was not available to one confined for a crime by a court of competent jurisdiction." *Duker* at 225. "Suspension statutes were aimed at suspects, never at convicts." Collings at 340-41.

c. Evidence from the Convention and ratification process. Records of the Constitutional Convention and the debates concerning adoption reflect no belief by the Framers that they were *creating* a substantive right to habeas corpus in the Suspension Clause, but rather that Congress was being restrained from suspending the *existing* common-law writ, as crystallized in the Habeas Corpus Act of 1679.

Charles Pinkney drafted a provision which would have both positively guaranteed the privilege of habeas corpus and allowed for suspension only upon "the most urgent and pressing occasions," for a period limited to a specified number of months, language closely resembling provisions in the Massachusetts and New Hampshire Constitutions. Collings at 341 and n.34. When the Committee on Detail presented its draft, the Pinkney habeas suggestion was absent, so he renewed the motion. *Id.* Only limited debate is recorded. Mr. Rutledge argued that habeas should be declared "inviolable," reasoning that he "did not conceive that a suspension could ever be necessary at the same time through all the States." 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 438 (1911). Governor Morris responded with a motion that may have been intended to satisfy Rutledge's qualm, by permitting a geographically limited, rather than necessarily nation-wide, suspension: "The privilege of the writ of habeas corpus shall not be suspended, unless where in cases of rebellion or invasion the public safety may require it." *Id.* Mr. Wilson responded to the Morris motion that he doubted whether a suspension could ever be necessary, "as the discretion now exists with judges, in most important cases to keep in gaol or admit to bail." The Morris motion nonetheless passed. *Id.* However, when the final draft was reported out by the Committee on Style, "where" had become "when," and it was passed by the Convention in that form. *Id.* at 596, 656. Thus, the final (and current) form of the Clause "assumes the existence of the privilege" (*Hurd* at 106), rather than purporting to create it.

That the Clause seeks only to protect a privilege already in being is further indicated by its treatment during the ratification debates. Luther Martin explained his negative

vote to the Maryland legislature in terms which presuppose the existence of the privilege; his concern was that authorization given to the central government to suspend the writ could be used as an instrument to oppress those in states which might oppose its policies. 3 *Farrand* at 213. However, his remarks all deal with habeas as a remedy against politically-motivated seizure and detention, and do not seem to conceive at all of habeas as being available to an ordinary convicted criminal. Moreover, his speech contains repeated references to suspension of the "habeas corpus *act*" (*id.*), even though Maryland possessed neither a state constitutional provision nor a state habeas statute until many years later. *States* at 249, 251-52. Hence, it is likely that he was referring to the common law writ as formalized by the Habeas Corpus Act of 1679, which, of course, did not apply to convicts.

To the same effect are the Federalist Papers, "to which, as Thomas Jefferson put it, 'appeal is habitually made by all, and rarely declined or denied by any' as to the 'genuine meaning' of the Constitution." *The Federalist Papers* at vii (C. Rossiter ed. 1961). Answering complaints that the Constitution does not expressly protect the right to jury trial in civil cases, Hamilton argues (No. 83) that it is far more important to provide protections in criminal cases, and that the Constitution does so:

> Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus act*, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

Id. at 499 (emphasis added). Since the Constitution contains no positive grant of habeas corpus, Hamilton could have only meant that it amply provides for the protection of the pre-existing right, the well-known Habeas Corpus Act of 1679,

which had been applied in New York in colonial cases. *Duker* at 115.

This conclusion is borne out by the second reference to habeas corpus, found in No. 84, where Hamilton is responding to the criticism that the Constitution should have included a bill of rights. He first enumerates the many protections which are included in the proposed Constitution, including limits on penalties to be imposed by impeachment, protection of jury trial, prohibition of bills of attainder or *ex post facto* laws, and the Suspension Clause. *Federalist* at 510-11. He then argues:

> It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of *titles of nobility, to which we have no corresponding provision in our [New York] Constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas*

> *corpus* act, which in one place he calls "the BULWARK of the British Constitution."

Id. at 511-12 (various emphases all original). Once again, we find: emphasis on habeas corpus as a remedy against summary imprisonments by arbitrary government (not a device for the relief of common criminals), and reliance on the common law tradition (embodied in "judicious Blackstone," together with the *act* which is the "BULWARK of the British Constitution") to define what is being "established" in the Suspension Clause.

Although Thomas Jefferson and four of the state ratifying conventions urged adoption of a bill of rights which established the habeas privilege in positive terms, no such affirmative right to habeas was proposed for inclusion in the Bill of Rights by the First Congress. Collings at 342-44. Instead, authority to issue the writ was granted to the federal courts in the Judiciary Act of 1789.

> [N]othing in the historical background provides any indication that a prisoner convicted according to the course of the common law was ever entitled to the writ. Furthermore, nothing in that history suggests that it was ever thought to be suspension of the writ to deprive convicts of its use. It seems altogether unlikely that the First Congress viewed the habeas corpus clause as establishing an affirmative right to the privilege of the writ. If they had so viewed the clause, why did they think it necessary in the Judiciary Act of 1789 to affirmatively give the federal courts jurisdiction to issue the writ? *One is driven to the conclusion that under our constitution, at least as it was understood in 1789, there was no right on the part of convicted prisoners to the privilege of habeas corpus. Such a right, if it was to exist at all, would have to come from Congress.*

Id. at 345 (emphasis added).

d. Early judicial considerations of the Clause. The first occasion for construing the Suspension Clause arose in *Ex parte Bollman*. As we have seen, Chief Justice Marshall

invoked Blackstone and the English common law in interpreting both the Clause and the Judiciary Act, and that was the Court's practice for many years. "This legislation [of 1679] and the decisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts." *McNally v. Hill*, 293 U.S. 131, 136 (1934) (citing cases). His acceptance of habeas as peculiarly a pretrial remedy was clearly indicated in *Bollman*, where he remarked that the question brought forward by a habeas petition is always separate from what is involved in "the cause itself": "The question whether the individual shall be imprisoned is always distinct from the question whether he *shall be* convicted or acquitted of the charge on which he *is to be* tried . . . " 4 Cranch at 101 (emphasis added). That the writ available through the federal courts did not extend to persons already convicted of crime by a court of competent jurisdiction was expressly stated in *Ex parte Watkins*, 3 Pet. at 202-03 (specifically following the Habeas Corpus Act of 1679). It is equally plain that habeas corpus did not afford any protection to persons in *state* custody; Section 14 of the Judiciary Act was limited to prisoners in custody "under or by colour of the authority of the United States." That the Judiciary Act's preclusion of state prisoner access to habeas relief deprived the federal courts of jurisdiction was acknowledged by *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). Other than some narrow situations (also established by statute), no right of habeas for state prisoners existed until passage of the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. *Felker v. Turpin*, 116 S. Ct. at 2338.

The 1789 Judiciary Act was created by a Congress that included many of the drafters of the Constitution, and it is inconceivable that that group would have passed anything which could have been perceived as trenching upon so dear a right as habeas corpus, particularly in light of the essentially simultaneous calls for inclusion of a positive guarantee of habeas corpus in the federal Bill of Rights. Chief Justice Marshall himself remarked:

> [T]his act was passed by the first congress of the United States, sitting under the constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suppression should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*.

Bollman, 4 Cranch at 95. The necessary conclusion is that excluding persons under criminal conviction from habeas protection (and convicted *state* prisoners doubly so) was *not* a violation of the Clause, as understood by its own drafters. That conclusion ought to be determinative for this Court as well.

> [E]arly congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning." Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions."

Printz v. United States, 117 S. Ct. 2365, 2370 (1997) (citations omitted).

e. Lessons from the Civil War and Reconstruction. Habeas corpus and the Suspension Clause received great attention during the Civil War, because President Lincoln actually did suspend the writ. See generally MARK E. NEELY, JR., THE ABRAHAM LINCOLN ENCYCLOPEDIA, "Habeas Corpus," 132-35 (1982).

Most significant for present purposes is the fact that, although there was heated debate about whether the Constitution lodged the authority to suspend the writ in the Executive

or only in the Congress, all parties to the controversy continued to look to English common law to determine the extent of the writ which was being suspended, and hence to treat habeas as strictly a remedy for detention without trial, rather than a means for quasi-appellate review of ordinary criminal convictions. For example, Chief Justice Taney, sitting as a circuit justice, directed that a southern sympathizer seized by military authorities should be released, on the grounds that Lincoln's executive order suspending habeas corpus was ineffective because only Congress could suspend the writ. *In re Merryman*, 17 Fed. Cas. 144 (1861), *reprinted in* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION 155-58 (1864). Taney's opinion, although applying the Suspension Clause and the Judiciary Act of 1789, continues to rely on the English Habeas Corpus Act of 1679 and English commentators (Blackstone and Hallam) to define the writ, and repeatedly refers to it as a means of obtaining *pretrial* release: under English practice, "if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character the court was bound to set him at liberty on bail" (*id.* at 156); freemen detained in prison on criminal charges could demand *habeas corpus ad subjiciendum*, and "according to the nature of the charge," the court would remand him, admit him to bail, or discharge him (*id.* at 157); Parliament could, by suspending the writ, authorize the Crown to imprison "suspected persons." *Id.*

Merryman was answered by a formal opinion from Lincoln's Attorney General, Edward Bates. *Id.* at 158-61. Much of the opinion is devoted to defending the President's right to suspend the writ, but when he discusses the nature of habeas corpus, Bates relies upon the same sources as Taney – English common law, especially as summarized by Blackstone. *Id.* at 160-61. Indeed, he considers that the federal courts have, under the Judiciary Act of 1789, "equivalent powers" to those exercised by the English courts. *Id.* at 160. Notable is his understanding of the Suspension Clause as a guard interposed against a replication of the English Government's assumption

of the power "to imprison whom it would, and hold them, for an indefinite term, beyond the reach of judicial examination" – an understanding which obviously does not contemplate the Suspension Clause as insuring post-trial review of ordinary criminal convictions.[5] And, most relevant to the current controversy, Bates states:

> [T]he Constitution is older than the judiciary act, and yet it speaks of the privilege of the writ of *habeas corpus* as a thing in existence; it is in general terms, and does not speak with particular reference to powers which might or might not be granted by a future act of Congress. Besides, *I take it for certain that, in the common course of legislation, Congress has power, at any time, to repeal the judiciary act of 1789 and the act of 1833 (which grants to the courts and to the judges the power to issue the writs) without waiting for a rebellion or invasion, and a consequent public necessity, to justify, under the Constitution, the suspension of the privilege of the writ of habeas corpus.*

Id. at 161 (emphasis added). Thus, between *Bollman* and Bates (and Lincoln), this Court and the highest Executive legal authorities agreed, throughout the early history of the

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[5] Lincoln, himself an accomplished attorney, likewise did not regard the Suspension Clause as guaranteeing the use of habeas corpus for review of ordinary criminal convictions. In a message to Congress, dated July 4, 1861, he described actions taken to deal with the crisis; among those, " to authorize the Commanding General . . . *to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without resort to the ordinary processes and forms of law*, such individuals as he might deem dangerous to the public safety." 4 COLLECTED WORKS OF ABRAHAM LINCOLN 429 (R. Basler ed. 1953) (emphasis added). His 1863 response to resolutions protesting the military arrest and detention of Clement Vallandigham states: "Habeas Corpus, *does not discharge men who are proved to be guilty of defined crime*; and its suspension is allowed by the constitution on purpose that, *men may be arrested and held, who cannot be proved to be guilty of defined crime . . .* " *Id.*, Vol. 6 at 264 (emphasis added).

republic, that habeas was not intended for relief of criminals after conviction, that power to issue the writ originates in statute, and that that statutory authority can permissibly be limited or eliminated.

That what Congress bestows out of legislative grace with regard to habeas corpus it may also limit, regulate, or take away was dramatically illustrated in the McCardle affair. In the Act of February 5, 1867 (14 Stat. 385), Congress had extended the habeas corpus jurisdiction of the federal courts to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States," and authorized appeals in such cases to the circuit courts and this Court. McCardle, the editor of a Mississippi newspaper, was taken into custody to be tried by a military commission, on the grounds that he had published "incendiary and libellous" articles, so he pursued habeas relief, including an appeal to this Court. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868). After denying a motion to dismiss the appeal, this Court heard argument on the merits for four days in early March of 1868, and took the matter under advisement, but before a decision could be reached, Congress passed a new statute (15 Stat. 44), eliminating this Court's authority to hear appeals in habeas cases. *Id.*[6] Despite fervent argument from McCardle's counsel, asserting that acceptance of such elimination of jurisdiction would imply power in Congress to deprive the Court of all authority, so that the Constitutionally-endowed "judicial power of the United States" would cease to exist, this Court agreed that the Act of 1868 had effectually removed its appellate jurisdiction, and dismissed the case. *Id.* at 509-10, 512-15.) That holding

[6] The specific design of this repeal, "as was avowed by Mr. Schenck, chairman of the House committee on ways and means, [was to] prevent[ ] this court from passing on the validity of reconstruction legislation." *Myers v. United States*, 272 U.S. 52, 166 (1926).

was reaffirmed in *Ex part Yerger*, 75 U.S. (8 Wall.) 85 (1868).[7]

McCardle and *Yerger* show that the authority of the federal courts to issue habeas corpus writs is fundamentally statutory in nature. It is constitutionally permissible for Congress to so limit that jurisdiction as to deprive some or all federal courts of habeas jurisdiction, and such elimination of habeas jurisdiction is effective, even when what might be considered "equitable" considerations (such as the arguably "bad" motive of Congress, and McCardle's reasonable expectation of receiving an adjudication of a fully-briefed, and under-submission case) seem to weigh in favor of the existence of jurisdiction. If Congress could eliminate federal ability to hear McCardle's appeal – and this Court held that it could – it is difficult to discern why Congress cannot also eliminate district court ability to hear Martinez-Villareal's competency claim, especially when it is presented in a second petition.

f. Modern statutes and cases. It is beyond the scope of this brief to thoroughly analyze habeas jurisprudence subsequent to the Reconstruction era, so only a few highlights will be noted. There unquestionably was a trend in this Court's opinions toward expanding availability of the writ, though that tendency recently has been reversed in some significant respects. *See, e.g., McCleskey v. Zant*, 499 U.S. at 478-96 (summarizing judicial expansion but imposing tightened "abuse of the writ" standard). On the other hand, aside from restoring this Court's appellate authority in habeas cases in 1885 (23 Stat. 437), Congress has generally tended to restrict the exercise of habeas, and such statutes have never been treated as violative of the Suspension Clause. *See, e.g.,*

[7] Although the Suspension Clause was not mentioned in *McCardle*, it was discussed at length in *Yerger*, which the Court described as undertaking a complete reconsideration of "the grounds upon which its jurisdiction has been heretofore maintained." 8 Wall. at 95. Thus, at least by implication, *Yerger* indicates that Congressional revocation of some aspect of habeas jurisdiction it had previously granted does not violate the Clause.

Whitney v. Dick, 202 U.S. 132 (1906) (newly-created courts of appeals not granted authority to issue original writs), and *Ahrens v. Clark*, 335 U.S. 188 (1948) (limiting territorially district court authority to issue the writ).

> Seemingly there is no constitutional objection in failing to make provision for habeas corpus, or even in abrogating it altogether as to particular persons or classes of persons. . . . Surely then when Congress increases the availability of the writ, only to find abuse, it can take corrective measures.

Collings at 359-61 (citing cases). That conclusion is supported by decisions subsequent to publication of the Collings article. For example, this Court vowed to enforce "the 1966 amendments embodied in § 2254(d) [that] were intended by Congress as limitations on the exercise of that [habeas] jurisdiction." *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). Most recently, of course, in *Felker*, this Court upheld the limits on successive petitions in the AEDPA against an explicit Suspension Clause challenge.

That this Court construed the availability of habeas relief expansively in the past clearly does not mean that Congressional enactment of limiting legislation amounts to a Suspension Clause violation. Even the most pro-expansion justices, whether in the majority or the minority, consistently acknowledged that ultimately it lies with Congress to define habeas corpus jurisdiction, thereby implicitly endorsing the thesis argued in this brief. "Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953). The most detailed rationalization for judicial expansion of the writ, Justice Brennan's opinion in *Fay v. Noia*, 372 U.S. 391 (1963), still speaks of: "the federal habeas corpus jurisdiction, 28 U.S.C. § 2241 et seq." *id.* at 394; "the power granted the federal courts under the federal habeas statute" (*id.* at 399); "the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary" (*id.* at 405); "power of the federal courts under 28 U.S.C. § 2243" (*id.* at 430). Similarly, again writing for the Court, he stated that, "With regard to both [federal and state prisoners] *Congress has determined* that the full protection of

their constitutional rights requires the availability of a mechanism for collateral attack." *Kaufman v. United States*, 394 U.S. 217, 228 (1969) (emphasis added).

The tide turned against expansive interpretation of the availability of the writ in *Stone v. Powell*, 428 U.S. 465 (1976), which overruled *Kaufman* and placed fully and fairly litigated Fourth Amendment claims outside federal habeas corpus consideration. Justice Brennan argued in dissent that the Court's action impermissibly "rewr[o]te jurisdictional statutes enacted by Congress." (*Id.* at 506.) Particularly noteworthy is his approving quotation of language from Justice Frankfurter's opinion in *Brown v. Allen*, including the following:

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. . . . It is not for us to determine whether this power should have been vested in the federal courts. . . . *[T]he wisdom of such a modification in the law is for Congress to consider . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress.* . . . Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. . . . *It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law.*

Id. at 526-28 (all emphasis added by Brennan). Justice Brennan's own statements are in the same vein: "[T]here is no constitutional warrant in this Court to override a congressional determination respecting federal-court review of decisions of state judges determining constitutional claims of state prisoners." *Id.* at 529. "[I]t is a matter for Congress, not this Court, to prescribe what federal courts are to review state prisoner's claims of constitutional error committed by state courts. . . . [T]he Court usurps the authority – vested by the Constitution in Congress – to reassign federal judicial responsibility for reviewing state prisoners' claims . . . " *Id.* at 535.

It therefore is clear that the greatest champions of judicial habeas expansion have accepted the power of Congress to thwart such expansion by enactment of restrictive legislation. It is of special interest to this case, in which Petitioners argue that Congress can preclude Martinez-Villareal from raising a purely sentence-related claim, that dissents by Justices Brennan and Marshall accept the idea that whether such claims can be presented in habeas corpus is a matter for Congress to decide. *See Teague v. Lane*, 489 U.S. 288, 339 (1989) ("Congress has not seen fit to withdraw" the benefits of allowing the federal courts to decide novel habeas claims not substantially related to guilt or innocence "by amending the statute that provides for them."); *Duckworth v. Eagan*, 492 U.S. 195, 223-24 (1989) (argument against Justice O'Connor's view "that federal habeas review should extend only to guilt-related claims" based on fact that "Congress believed that defendants have rights, often unrelated to guilt or innocence, that would be worthy of collateral protection."). They would, therefore, have been required on principle to reject the action of the court of appeals in this case, which was nothing less than an arrogation to itself of authority to insist that a non-guilt claim be heard in habeas, and to determine which federal court should hear it (the lower federal courts by habeas, rather than this Court by certiorari), all contrary to the clearly expressed will of Congress.

g. Conclusions. It does not violate the Suspension Clause to apply the AEDPA to foreclose a successive petition by Martinez-Villareal. The Clause is only violated when the writ is restricted to a narrower compass than it enjoyed when the Clause was drafted, but the writ protected by the Suspension Clause extended neither to convicts of any sort, nor to persons held under state (as opposed to federal) authority. The restrictions effected by § 2244(b)(1) and (2) do not abrogate the privilege of habeas corpus, but apply some limits on its availability in *successive* applications, which this Court has consistently agreed ought to be restricted more than initial petitions. *See, e.g., Lonchar v. Thomas*. In the debates concerning the AEDPA, members of both houses repeatedly voiced understanding of the distinction between the modern,

statutorily-created habeas writ and the "Great Writ" which is protected by the Suspension Clause.[8] Thus, Congress' intent to do only what was constitutionally permissible for it to do – modify the *statutory* writ of habeas corpus it had created in 1867, while leaving the Constitutionally-protected "Great Writ" untouched – is certain.

There having been no petitions available at all for persons like Martinez-Villareal in 1789, the AEDPA's partial return to a jurisprudential state of affairs more closely resembling that which prevailed, at the time of the Framers, cannot reasonably be deemed a "suspension" of the writ. DUKER at 155.[9] "[I]t is conventionally assumed that perpetuation of federal district court habeas corpus jurisdiction is not constitutionally required, on the theory that Congress is free to give what items of federal jurisdiction it chooses to courts which, unlike the Supreme Court, exist only by congressional sufferance." Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus For State Prisoners*, 66 YALE L.J. 50, 63 (1966).

It therefore appears that the Ninth Circuit was still laboring under the erroneous "revisionist view of the historic function that [habeas corpus] writ was meant to perform" (*Schneckloth v. Bustamonte*, 412 U.S. at 252), which Justice Powell debunked more than 25 years ago. Because it is plain that the AEDPA's restrictions on successive petitions do not violate the Suspension Clause, the court of appeals' decision collapses – no violation means no grounds for redrafting the

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[8] 141 Cong. Rec. H1402, H1408, H1410 (daily ed. Feb. 8, 1995); S7836, S7841 (daily ed. June 7, 1995); S3447 (daily ed. April 17, 1996). Indeed, one congressman quoted the Powell Commission Report's statement that the Constitution "does not provide for federal habeas corpus review of state court decisions." 141 Cong. Rec. H1415 (daily ed. Feb. 8, 1995).

[9] Professor Duker's thesis (126-56) is that the Suspension Clause was intended only to prevent Congress from suspending *state* habeas remedies. Without referring to Duker, such a concept was described as a "cogent argument" in JOSEPHINE R. POTUTO, PRISONER COLLATERAL ATTACKS § 1:4 at 8 (1991).

statute and no basis for either transferring Martinez-Villareal's successive petition to the district court or permitting it to be filed.

C. Martinez-Villareal Cannot Be Exempted From The Operation of the Act.

Though elaborately dressed in language about stays which must be issued to prevent issues becoming moot and exhaustion principles (118 F.3d at 630, 632-34), the crux of the court of appeals' reason for its decision in this case is that it had to devise a mechanism "to ensure that a petitioner's federal claims are accorded one hearing in federal court." *Id.* at 633. Martinez-Villareal certainly *did* present a "federal claim" in his certiorari petition to this Court, after the state courts had determined him to be competent for execution, but the court of appeals deemed that process insufficient. *Id.* at 631 n.3. What the court of appeals really said is that it is free to disregard the plain meaning of the Act, to guarantee that Martinez-Villareal present his competency claim to a *district court*. That is plainly wrong. Despite relying upon other parts of that decision, the court of appeals disregarded the central point of *Lonchar v. Thomas*, that legal principles governing habeas corpus today are primarily embodied in statutes, so that the "balancing of objectives (sometimes controversial) . . . is normally for Congress to make," and the courts are entitled to make such determinations *only* "when Congress has not resolved the question." 116 S. Ct. at 1298.

> [T]he fact that the writ has been called an "equitable remedy" does not authorize a court to ignore this body of statutes, rules, and precedents. "There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges." Rather, "courts of equity must be governed by rules and precedents no less than the courts of law." As Selden pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot.

Id. (citations omitted). Since Congress, through the restrictions promulgated in § 2244(b)(1) and (2), *has* "resolved the question" of which successive petitions may be heard, the court of appeals was not free to fashion an exemption from those restrictions to fit what it perceived to be the balance of equities presented by the supposedly "unique nature of a competency claim" such as Martinez-Villareal's. See 118 F.3d at 634.

In fact, Martinez-Villareal's situation is not at all unique. He is just like every other convict who has found himself outside the scope of available relief, and had his expectations of consideration of his claims dashed, when some line has been drawn. Who could urge more strongly that "fairness" entitled him to a decision on his claims than Mr. McCardle, whose case had been briefed, argued, and taken under submission by this Court? But when Congress changed the rules, this Court accepted that, regardless of how well-founded his expectations of relief might have been. McCardle was out of court. Martinez-Villareal's situation is not distinguishable from those of multitudes of petitioners (including many under sentences of death) who have found themselves on the wrong side of new restrictions on habeas relief: Warren McCleskey's expectations of relief ran aground when this Court adopted the rule that the cause and prejudice standard would be applied to questions of "abuse of the writ." The expectations of Frank Teague and Horace Butler went a glimmering when the Court determined that "new rules" of criminal procedure could not normally be adopted in habeas proceedings, and this Court subsequently stated that, "Nor does such a [habeas] petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest . . . " *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993).

The situation is no different when the change occurs by statute. A murderer named Randy Greenawalt was executed despite his claim (remarkably similar to Martinez-Villareal's) that the AEDPA's preclusion of his successive petition

(involving a sentence-related claim which was not exhausted until after enactment of the statute) created an "unprecedented situation" amounting to a violation of the Suspension Clause. *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997). Despite the allegedly "special" nature of a claim of incompetency to be executed, the Act was applied to preclude such claims in successive petitions (regardless of the rationale for not presenting them previously) in both *Medina*, 109 F.3d at 1561-65, and *Davis*, 121 F.3d at 955-56.

Although not mentioning it by name, the court of appeals' decision here resonates with echoes of *Fay v. Noia*. *Fay* asserted that the function of habeas corpus is, without limitation of any kind, "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." 372 U.S. at 401-02. It therefore insisted that, "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." 372 U.S. at 424. This view of habeas corpus as affording guaranteed access to the federal district courts for review of state criminal convictions purported to stand on two historical pillars: the breadth of the common law writ, as adopted into American law through the Judiciary Act of 1789 (*id.* at 399-406, 422-23), and the expansion authorized by the Act of 1867. *Id.* at 415-22.

The validity of this historical analysis, which ignored the information in Professor Bator's then-recent Harvard Law Review article, was strongly challenged even when it was announced, by Justice Harlan's dissent. *Id.* at 449-63. Now, under the assault of intense historical investigation, both of *Fay*'s pillars have crumbled. Fay's statements about the common law usages of habeas and about the intent of Congress in passing the Act of 1867 having been shown to be deeply flawed. *See, e.g.*, Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court*

as Legal Historian, 33 U. CHI. L. REV. 31 (1965); Henry J. Friendly, *Is Innocence Irrelevant?, supra.*[10]

Moreover, quite apart from its historical inaccuracy, *Fay's* belief in the universal availability of federal review of federal questions has been rejected by this Court, both in the context of habeas corpus and elsewhere. Although that rejection is most explicit in *Wainwright v. Sykes*, 433 U.S. 72, 87-89 (19977), *Coleman v. Thompson*, 501 U.S. 772, 744-51 (1991), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-8 (1992), it is clearly reflected in other statements by the Court as well. "Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights." *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510 (1982) (finding no federal jurisdiction over involuntary termination of parental rights). The Court disapproved "a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises," in *Allen v. McCurry*, 449 U.S 90, 103-04 (1980) (construing 28 U.S.C. § 1983). "[T]here is no 'universal right to litigate a federal claim in a federal district court.' " *Matsushita Electrical Industrial Co., Inc., v. Epstein*, ___ U.S. ___, 116 S. Ct. 873, 883 (1996).[11]

The court of appeals' handling of this case not only divests Congress of its authority to legislate with regard to

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[10] Efforts to challenge Professor Bator and support *Fay*'s analysis have been unsuccessful. *See, e.g.*, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995) (critiquing works by Gary Peller, James Liebman, and Ann Woolhandler).

[11] Justice Scalia has specifically criticized "the theory advanced in *Fay v. Noia*, that a federal forum must be afforded for every federal claim of a state criminal defendant" as being "profoundly wrong." *Withrow v. Williams*, 507 U.S. 680, 721-24 (1993) (concurring in part and dissenting in part).

habeas corpus, it unacceptably denigrates the ability of state courts to make responsible determinations of federal questions such as competency for execution.

> While we can assume there is a special role for Article III courts in the interpretation and application of federal law in [some] instances . . . , we do not for that reason conclude that state courts are a less than adequate forum for resolving federal questions. A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism. In *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976), we expressed our "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so."

Idaho v. Coeur d'Alene Tribe of Idaho, ___ U.S. ___, 117 S. Ct. 2028, 2037 (1997).

It being clear that the Suspension Clause is not violated by enforcing the § 2244(b)(1) and (2) restrictions on successive petitions, the court of appeals was not entitled to disregard the plain meaning of the statute. *Sumner v. Mata*, 449 U.S. at 545-48 and n.2 (this Court refused to read limitation into language of habeas statute and affirmed that "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded"). Martinez-Villareal was accorded a full and fair opportunity to litigate his competency for execution in the state court, with opportunity to request certiorari review in this Court, and that is all that he is entitled to.[12] Therefore,

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[12] Permitting federal review of competency for execution only by certiorari does not prejudice inmates because, even apart from the AEDPA's restrictions, the scope of review of such claims is extremely narrow. Competency determinations are factual matters, based largely on assessment of demeanor and credibility, so the trial judge's conclusions must be accepted by all federal courts if supported by the record. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Miller v. Fenton*, 474 U.S. 104, 112-17 (1985); *Maggio v. Fulford*, 462 U.S. 111, 116-18 (1983). All the opinions in *Ford v. Wainwright* clearly contemplated that that standard of review would apply to competency for execution, and federal cases applying *Ford* consistently defer to state court determinations supported by the evidence. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.), *cert. denied*, 115 S. Ct. 1841 (1995); *Shaw v. Armontrout*, 900 F.2d 123, 126 (8th Cir. 1990); *Graham v. Lynaugh*, 854 F.2d 715, 720-21 (5th Cir. 1988). Where (as here) the state court conducted a meaningful evidentiary hearing, there simply will be no grounds for relief, regardless of which federal court conducts the review. In effect, the state court's determination of the fact-bound competency issue is dispositive of the federal claim.

this Court should enforce the Act in this case, by holding that Martinez-Villareal is subject to it, that his current petition *is* successive, and that because it does not satisfy the requirements of the Act, it cannot be entertained by the district court.

III

REGARDLESS OF HOW THE COURT DETERMINES THE MERITS OF THE CLAIMS PRESENTED BY PETITIONERS, THE COURT POSSESSES JURISDICTION OVER THOSE CLAIMS.

A. Propriety of Relying on Multiple Jurisdictional Basis.

The appropriate basis for the Court's jurisdiction is bound up with the merits of the case. This matter reached the Ninth Circuit through a motion requesting permission to file a successive petition, as required by 28 U.S.C. § 2244(b)(3)(A). Section 2244(b)(3)(E) forbids review of such rulings by rehearing or certiorari, suggesting that parties seeking review of the circuit court's determination cannot use "statutory" certiorari, and can obtain relief only by a writ under 28 U.S.C. § 1651(a). However, the Ninth Circuit refused to apply the AEDPA, and avoided its constraints on successive habeas petitions by creating a special category of "non-successive" successive petitions. 118 F.3d at 632-35. If the AEDPA and its preclusion of review do not apply here, then ordinary certiorari is available. However, Petitioners' position is that the Ninth Circuit is wrong in its interpretation of the AEDPA, so

that if Petitioners approached this Court only by means of statutory certiorari, and persuaded it that the Ninth Circuit should have applied the Act, they might find that they had lost their remedy, by persuading the Court that it lacks jurisdiction to hear the case. *Cf. Felker*, 116 S. Ct. at 2341 (dismissing writ of certiorari for lack of jurisdiction).

To avoid this possibility, Petitioners brought a combined petition, relying on both statutory certiorari (28 U.S.C. § 1254(1)) and all the various forms of relief permitted under the All Writs Act (28 U.S.C. § 1651(a)). This Court simultaneously entertained variously-framed petitions, brought by different parties but all raising the same issue of statutory construction, in *Ex parte Collett*, 337 U.S. 55, 57 (1949), *Kilpatrick v. Texas & Pacific Ry. Co.*, 337 U.S. 75, 77 (1949), and *United States v. National City Lines, Inc.*, 337 U.S. 78, 80 (1949). Its willingness to do so seems to indicate that, where there is doubt about the appropriate vehicle by which to present an important statutory or constitutional issue, providing a variety of options, so that the procedural niceties of any particular mechanism do not prevent review, is acceptable to the Court. *See* R. STERN ET AL, SUPREME COURT PRACTICE at 493-94 and n.5 (7th ed. 1996). Although the Court granted "certiorari" in this case, it did not specify the authority employed. Since the issue apparently remains open, Petitioners discuss below what appear to be the relevant jurisdictional concerns, but the Court is urged to employ whatever procedural option it prefers to reach the merits of this case.

B. "Statutory" Certiorari Under 28 U.S.C. § 1254(1).

If the preclusion of certiorari review in 28 U.S.C. § 2244(b)(3)(E) applies to the court of appeals' decision in this case, then this Court would have to resort to an "extraordinary writ" to consider the matter. However, Petitioners contend that statutory certiorari *is* available, because of the nature of the ruling actually made by the Ninth Circuit and because of the language of the review-prohibiting provision.

The § 2244(b)(3)(E) prohibition on review applies only to "The grant or denial of an authorization by a court of

appeals to file a second or successive application . . . " However, the Ninth Circuit neither granted nor denied authorization for the filing of a second or successive petition. Instead, it concluded that, "Martinez-Villareal's competency claim *is not subject to the restrictions imposed by § 2244(b).* Therefore, *we dismiss as unnecessary* Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court." 118 F.3d at 634 (emphasis added). Thus, the issue before this Court simply is not one to which the prohibition of review applies – the question here is whether the court of appeals was correct that "the restrictions imposed by § 2244(b)" do not govern competency for execution claims, and only if *that* decision is reversed will any court actually determine whether authorization should be granted for the filing of a second petition by Martinez-Villareal. Hence, the prohibition against review is not applicable.

That this is the proper approach is demonstrated by this Court's handling of prior cases involving similar restrictions on review. *See Johnson v. Robison*, 415 U.S. 361, 267 (1974); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492 (1991). Similarly, the issues here are the proper *construction* of the AEDPA (*i.e.*, whether it should be understood to apply to the *class* of claims of incompetency for execution presented in successive habeas petitions), and the *constitutionality* of the AEDPA, rather than an individual determination *under* the AEDPA about whether to grant authorization for a particular successive petition. Therefore, *Johnson* and *McNary* show that the prohibition on review in 28 U.S.C. § 2244(b)(3)(E) does not apply to the questions raised by this case, and that this Court can exercise review by means of "statutory" certiorari.

C. Jurisdiction Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and Supreme Court Rule 20.

The types of writs available under the statute have been summarized as follows:

> In general, the writ of mandamus is sought to compel a lower court to do something it has refused

> to do, and the writ of prohibition to prohibit it from doing something it otherwise will do. But since almost any issue may be phrased either affirmatively or negatively, these writs are often used interchangeably; frequently, indeed, counsel request both "mandamus and prohibition" to play it safe. The writ of certiorari under § 1651 orders the lower court to certify the record to the Supreme Court. This rarely used writ has been used to bring before the Court for review, in exceptional circumstances, otherwise non-appealable orders. It "is not the statutory writ of certiorari" but instead "a kind of reserve power, preserved by the 'all-writs' section, 28 U.S.C. § 1651(a), and available for use in exceptional cases."
>
> Although the several writs to some extent serve different functions, they overlap considerably, and the same general principles guide the Court in determining whether to allow each of them.

STERN ET AL. at 493-94 (citations omitted). This case demonstrates the truth of these comments: we have exceptional circumstances involving an arguably non-appealable order; Petitioners desire the district court to be prohibited from entertaining Martinez-Villareal's successive habeas petition; but the occasion for the problem is the court of appeals' usurpation of judicial power, by imposing on the AEDPA an interpretation it will not bear, so that it supposedly allows Martinez-Villareal to file a successive petition. Therefore, Petitioners request this Court to use whichever writ it deems proper to review the court of appeals' "proposed disposition of a motion for leave to file a second or successive habeas petition," as invited by the concurring opinions of Justices Stevens and Souter in *Felker*, 116 S. Ct. at 2341.

Section 1651(a), as explicated by Supreme Court Rule 20, requires that for the extraordinary writs to issue: (1) such action must be in aid of this Court's appellate jurisdiction; (2) exceptional circumstances must exist that warrant the exercise of this Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court.

All of these somewhat overlapping considerations are present in this case.

Granting an "extraordinary writ" here would be particularly appropriate in light of this Court's announced willingness to employ such a writ "where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *State of Maryland v. Soper*, 270 U.S. 9, 46 S. Ct. 185, 70 L. Ed. 449 (1926)." *Will v. United States*, 389 U.S. 90, 95 (1967). In *Soper*, this Court recognized that the effect of the removal to federal court of a murder case involving revenue agents was that "the jurisdiction of the courts of a state to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court;" therefore, to prevent improper intrusion by an inferior federal court into the criminal processes of a state (comparable to the intrusions that this Court and Congress recognize are visited upon the states through excessive habeas proceedings), this Court granted mandamus and reversed the erroneous removal order. 270 U.S. at 29-30.

In sum, Petitioners assert that jurisdiction exists for this Court to review the Ninth Circuit's decision by means of ordinary "statutory" certiorari, despite the existence of the limitation on review included in the AEDPA. If, however, the Court concludes that statutory certiorari is unavailable, it should exercise its discretion to hear the case under whichever of the § 1651(a) "extraordinary writs" is appropriate.

CONCLUSION

The Ninth Circuit has usurped legislative authority by rewriting the 1996 Antiterrorism and Effective Death Penalty Act, even though that statute does not, in fact, contravene the Suspension Clause. Martinez-Villareal is not constitutionally entitled to federal collateral review of his competency for execution claim, and has had full and fair direct state and federal review of that factual issue. Petitioners therefore respectfully urge this Court to use whatever writ is appropriate, to review this case and to correct the error of the court of

appeals, by holding that Martinez-Villareal *has* filed a successive petition subject to the restrictions of the AEDPA, that it does not meet the requirements of that statute, and that the court of appeals' order transferring the petition to the district court must be vacated, the successive petition to be dismissed with prejudice.

Respectfully submitted,

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APENDICES

APPENDIX A

28 U.S.C. §§ 2244, 2253, 2254, and 2255, as amended (Reflecting changes effected by P.L. 104-132, Antiterrorism and Effective Death Penalty Act of 1996)

§ 2244. FINALITY OF DETERMINATION [Amended.]

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus ~~and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry,~~ *except as provided in section 2255.*

~~(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.~~

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not

be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme

Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub. L. 104-132, §§ 101, 106.)

§ 2253. APPEAL [Amended.]

(a) In a habeas corpus proceeding *or a proceeding under section 2255* before a ~~circuit or~~ district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit ~~where~~ *in which* the proceeding is ~~had~~ *held.*

(b) There shall be no right of appeal from ~~such an~~ *a final* order in a proceeding to test the validity of a warrant to remove~~;~~ to another district or place for commitment or trial~~;~~ a person charged with a criminal offense against the United States, or to test the validity of ~~his~~ *such person's* detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an ~~An~~ appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding ~~where~~ *in which* the detention complained of arises out of process issued by a State court ~~; unless the justice or judge who rendered the order or a~~

~~circuit justice or judge issues a certificate of probable cause.~~; *or*

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub. L. 104-132, § 102.)

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS [Amended.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)*(1)* An application for a writ of habeas corpus *on* ~~in~~ behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State~~;~~ or ~~that~~

(B)(1) there is ~~either~~ an absence of available State corrective process; or ~~the existence of~~

(ii) circumstances *exist that* render~~ing~~ such process ineffective to protect the rights of the *applicant* ~~prisoner~~.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

~~*(d)*~~*(e)(1)* In *a* ~~any~~proceeding instituted ~~in a Federal court~~ by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ~~after a hearing on the merits~~ of a factual issue; made by a State court ~~of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion; or other reliable and adequate written indicia;~~ shall be presumed to be correct. *The applicant*

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. ~~*; unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –*~~

~~*(1) that the merits of the factual dispute were not resolved in the State court hearing;*~~

~~*(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;*~~

~~*(3) that he material facts were not adequately developed at the State court hearing;*~~

~~*(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;*~~

~~*(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;*~~

~~*(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or*~~

~~*(7) that the applicant was otherwise denied due process of law in the State court proceeding;*~~

~~*(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made; pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:*~~

~~*And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant or establish by convincing evidence that the factual determination by the State court was erroneous.*~~

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(e)~~*(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the

record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~*(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act,[1] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(1) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub. L. 104-132, § 104.)

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[1] 21 U.S.C. § 848.

§ 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE [Amended.]

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub. L. 104-132, § 105.)

§ 2253. APPEAL [Amended.]

(a) In a habeas corpus proceeding *or a proceeding under section 2255* before a ~~circuit or~~ district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit ~~where~~ *in which* the proceeding is ~~had~~ *held.*

(b) There shall be no right of appeal from ~~such an~~ *a final* order in a proceeding to test the validity of a warrant to remove~~;~~ to another district or place for commitment or trial~~;~~ a person charged with a criminal offense against the United States, or to test the validity of ~~his~~ *such person's* detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an ~~An~~ appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding ~~where~~ *in which* the detention complained of arises out of process issued by a State court~~; unless the justice or judge who rendered the order or a~~

~~circuit justice or judge issues a certificate of probable cause;~~ *or*

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub. L. 104-132, § 102.)

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS [Amended.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)*(1)* An application for a writ of habeas corpus *on* ~~in~~ behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State~~;~~ or ~~that~~

(B)(1) there is ~~either~~ an absence of available State corrective process; or ~~the existence of~~

(ii) circumstances *exist that* render~~ing~~ such process ineffective to protect the rights of the *applicant* ~~prisoner~~.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

~~(d)~~*(e)(1)* In *a* ~~any~~ proceeding instituted ~~in a Federal court~~ by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ~~after a hearing on the merits~~ of a factual issue; made by a State court ~~of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia,~~ shall be presumed to be correct. *The applicant*

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence, ~~unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~

~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~

~~(3) that the material facts were not adequately developed at the State court hearing;~~

~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~

~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;~~

~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~

~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~

~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(e)~~*(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record

pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~*(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act,[2] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(I) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub. L. 104-132, § 104.)

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[2] 21 U.S.C. § 848.

§ 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE [Amended.]

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A or title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

> *(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or*
>
> *(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.*

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub. L. 104-132, § 105.)